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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON  
7

8 JODY D. SHOCKLEY,  
9 Plaintiff,

10 v.

11 JO ANNE B BARNHART,  
12 Commissioner of Social Security,  
13 Defendant.  
14

} NO. CV-04-0342-AAM  
}

} **ORDER GRANTING DEFENDANT'S**  
} **MOTION FOR SUMMARY**  
} **JUDGMENT, *INTER ALIA***  
}

15 BEFORE THE COURT are cross-motions for Summary Judgment (Ct. Rec. 11,  
16 15). Maureen Rosette represents Jody D. Shockley (Plaintiff); Pamela Derusha, Chief  
17 Civil Assistant U.S. Attorney and Leisa A. Wolf, Special Assistant United States  
18 Attorney, represent the Commissioner of the Social Security Administration  
19 (Defendant). After reviewing the administrative record and briefs filed by the parties,  
20 the court **DENIES** Plaintiff's motion for summary judgment (Ct. Rec. 11) and  
21 **GRANTS** Defendant's motion for summary judgment (Ct. Rec. 15).  
22

23 **I. JURISDICTION**

24 On June 26, 2000, Plaintiff filed for Supplemental Security Income (SSI) benefits  
25 under Title XVI of the Social Security Act. (Tr. 83-86.) Alleging an onset date of April  
26 1, 1993, he claimed disability due to hypothyroidism, gout, arthritis, chronic fatigue,  
27 anemia, headaches, and reflux disease. (Tr. 90). His application was denied initially  
28 and on reconsideration. (Tr. 38, 44). He requested a hearing before an Administrative

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1 Law Judge (ALJ), which was held on January 24, 2002, before ALJ Paul Gaugen. (Tr.  
 2 47-48, 350-382). Plaintiff, who was represented by an attorney, and vocational expert  
 3 Thomas Moreland testified at this hearing. The ALJ determined that additional  
 4 evidence was needed and another hearing was held on March 11, 2003. (Tr. 381, 383-  
 5 406). Plaintiff, Mr. Moreland and medical expert Robert Klein, Ph.D. testified at this  
 6 hearing.

7 The ALJ issued his decision on May 16, 2003, and found Plaintiff not disabled at  
 8 any time through the date of his decision. (Tr. 18-27). The Appeals Council denied  
 9 Plaintiff's request for review, making the ALJ's decision the final Agency decision.  
 10 (Tr. 6-8). This matter is before the district court pursuant to 42 U.S.C. § 405(g).

## 11 II. SEQUENTIAL EVALUATION

12 The Social Security Act defines disability as the "inability to engage in any  
 13 substantial gainful activity by reason of any medically determinable physical or mental  
 14 impairment which can be expected to result in death or which has lasted or can be  
 15 expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§  
 16 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant shall be  
 17 determined to be under a disability only if his impairments are of such severity that the  
 18 claimant is not only unable to do his previous work but cannot, considering claimant's  
 19 age, education and work experiences, engage in any other substantial gainful work  
 20 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

21 The Commissioner has established a five-step sequential evaluation process for  
 22 determining whether a person is disabled. 20 C.F.R. §§ 404.1520,<sup>1</sup> 416.920; *Bowen v.*  
 23 *Yuckert*, 482 U.S. 137, 140-42 (1987).

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24  
 25 <sup>1</sup> Certain sections of 20 C.F.R. addressing Title II and Title XVI benefits have  
 26 been amended. 68 F.R. 51153. The amendments are applicable to administrative  
 27 decisions dated on or after September 25, 2003. 68 F.R. 51159. Accordingly, the  
 28 amendments are not applicable here. Any reference to C.F.R. sections in this opinion is  
 pre-amendment.

1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §§  
2 404.1520(b), 416.920(b). If he is, benefits are denied. If he is not, the decision maker  
3 proceeds to step two.

4 Step 2: Does the claimant have a medically severe impairment or combination of  
5 impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does not have a  
6 severe impairment or combination of impairments, the disability claim is denied. If the  
7 impairment is severe, the evaluation proceeds to the third step.

8 Step 3: Does the claimant's impairment meet or equal one of the listed  
9 impairments acknowledged by the Commissioner to be so severe as to preclude  
10 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. § 404  
11 Subpt. P. App. 1. If the impairment meets or equals one of the listed impairments, the  
12 claimant is conclusively presumed to be disabled. If the impairment is not one  
13 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

14 Step 4: Does the impairment prevent the claimant from performing work he has  
15 performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant is able to  
16 perform his previous work, he is not disabled. If the claimant cannot perform this work,  
17 the evaluation proceeds to the fifth and final step.

18 Step 5: Is the claimant able to perform other work in the national economy in  
19 view of his age, education and work experience? 20 C.F.R. §§ 404.1520(f), 416.920(f).

20 The initial burden of proof rests upon the plaintiff to establish a prima facie case  
21 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
22 1971). This burden is met once a claimant establishes that a physical or mental  
23 impairment prevents him from engaging in his previous occupation. At step five, the  
24 burden shifts to the Commissioner to show that (1) the claimant can perform other  
25 substantial gainful activity; and (2) a "significant number of jobs exist in the national  
26 economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir.  
27 1984).

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### III. STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001) the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Morgan v. Commissioner of Social Security*, 169 F.3d 595, 599 (9<sup>th</sup> Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9<sup>th</sup> Cir. 2000).

### IV. STATEMENT OF THE CASE

The facts of the case are set forth in the transcript and the ALJ's decision and will be summarized briefly here. Plaintiff was 28 at the time of the first hearing and had a high school education. (Tr. 357). He was 5'10" and weighed 360 pounds. (Tr. 357). He has worked as an almond huller, an iron worker and a laborer on a dairy farm. (Tr. 359-60). He was not married and had no children. (Tr. 357). His sole source of income at the time of the hearing was public assistance. (Tr. 371-72).

Plaintiff testified he spends most of his days sleeping, watching television and playing video games. (Tr. 369). He stated he cooks sometimes and takes out the garbage but is not able to do other household chores. (Tr. 367-68). He testified he does not drive and does not have a driver's license. (Tr. 368-69). He testified that he could stand for no more than 30 minutes, walk for about two blocks, and sit for only 15 to 20 minutes before he got tired or started hurting. (Tr. 363-64). He stated he could lift about 10 pounds. (Tr. 366). Plaintiff was taking allopurinol for his gout, Levoxyl for his hypothyroidism, and heartburn and pain medication. (Tr. 388-89).

## V. ADMINISTRATIVE DECISION

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since the alleged onset of disability. (Tr. 26). At step two, he found Plaintiff did not suffer from a severe mental impairment, but had severe physical impairments of tophaceous gout with intermittent, but not frequent, flare-ups, and morbid obesity. He found these physical impairments were not severe enough to meet or equal one of the impairments listed in Appendix 1, Subpart P of the Regulations. (Tr. 23). The ALJ found Plaintiff's testimony at the hearing regarding his limitations was not entirely credible. (*Id.*) At step four, he found Plaintiff had no past relevant work and the residual functional capacity to perform a significant range of sedentary work "with the option to alternate sitting/standing, as often as every 30 minutes, subject to no complex reading or writing tasks." (Tr. 26). He further found that Plaintiff was limited to simple instructions (no detailed or complex instructions) and that he could not respond or adapt to frequent changes in work routine. (*Id.*) Using the Grids<sup>2</sup> as a framework and the testimony of the vocational expert, the ALJ found Plaintiff could perform a significant number of sedentary jobs in the national economy and, thus, was not under a "disability" as defined by the Social Security Act at any time through the date of his decision. (Tr. 27).

## VI. ISSUES

Plaintiff contends the ALJ's decision is not supported by substantial evidence and is tainted by legal error. Specifically, he argues that the ALJ erred when he relied upon the medical expert testimony and improperly rejected the medical opinions of examining psychologist, Dr. Pollack. He further argues that his pain and symptom testimony was improperly rejected. (Ct. Rec. 12, p. 11, 13).

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<sup>2</sup> Medical-Vocational Guidelines, 20 C.F.R. Pt. 404, Subpt. P, App. 2.

## VII. DISCUSSION

### A. Conflicting Medical Evidence of Mental Impairment

Plaintiff argues that medical evidence establishes a severe mental impairment that precludes his ability to work in the national economy. (Ct. Rec. 12, p. 14). An impairment is not severe if “it does not significantly limit your physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1521. To satisfy step two’s requirement of a severe impairment, the claimant must prove the existence of a mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant’s own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. However, an overly stringent application of the severity requirement violates the statute by denying benefits to claimants who do meet the statutory definition of disabled. *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the Commissioner has passed regulations which guide dismissal of claims at step two.

The Regulations state an impairment may be found to be “not severe” only when evidence establishes a “slight abnormality” on an individual’s ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ must consider the combined effect of all of the claimant’s impairments on the ability to function, without regard to whether each alone was sufficiently severe. *See* 42 U.S.C. § 423(d)(2)(B)(Supp. III 1991). The step two inquiry is a *de minimis* screening device to dispose of groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987).

The initial burden to establish a severe impairment is on the claimant, who must provide medical evidence showing he has an impairment and how severe it is during the time he says he is disabled. 20 C.F.R. § 404.1512(c).

Plaintiff submitted psychological evaluations from examining psychologists Jerry Larson, Ph.D., Thomas McKnight, Ph.D., and Dennis R. Pollack, Ph.D. (Tr. 188, 246, 289). Also submitted were the psychiatric review technique form (PRTF) and mental residual functional capacity (RFC) assessment completed by reviewing state agency

1 psychologist Michael Brown, Ph.D. (Tr. 251, 265).

2 Dr. Larson examined Plaintiff on June 13, 2000, administered a TOPS Personality  
3 Inventory (an intelligence test) and conducted a clinical interview. He concluded  
4 Plaintiff had an overall IQ of 88 and diagnosed a generalized anxiety disorder with mild  
5 paranoia. He assessed Plaintiff with a Global Assessment of Functioning (GAF) score  
6 of 55-60 (moderate).<sup>3</sup> (Tr. 188-89). Dr. McKnight evaluated Plaintiff on November 9,  
7 2000. His evaluation consisted of objective testing with the third edition of the  
8 Wechsler Adult Intelligence Scale (WAIS-III), a review of medical records (including  
9 Dr. Larson's report) and a mental status examination. (Tr. 246-47, 249). Dr. McKnight  
10 concluded Plaintiff had a full scale IQ of 81, with a verbal and performance scores of  
11 83, a working memory index score of 82, and a verbal comprehension index score of 89.  
12 (Tr. 249). He opined Plaintiff was functioning within the upper limits of the borderline  
13 range of measured intellectual ability, with a fund of knowledge "greater than  
14 expected," probably due to Plaintiff's television watching. (Tr. 250). He found no  
15 Axis I diagnosis, an Axis II diagnosis of borderline intellectual functioning,  
16 psychosocial and environmental problems, and a GAF score of 65-70 (mild). (*Id.*) Dr.  
17 McKnight concluded that there were "no psychological factors that preclude this  
18 individual from full time gainful employment involving a 2-3 step repetitive tasks." (Tr.  
19 246, 50).

20 State agency psychologist Dr. Brown reviewed the records, and completed the  
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23 <sup>3</sup> The GAF scale is a common tool for tracking and evaluating the overall  
24 psychological functioning of a patient. A score of 51-60 indicates "moderate symptoms  
25 (e.g., flat affect and circumstantial speech, occasional panic attacks) OR moderate  
26 difficulty in social, occupational, or school functioning (e.g., no friends, unable to keep  
27 a job.)" A score of 61-70 indicates "some mild symptoms, (e.g., depressed mood and  
28 mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g.,  
occasional truancy, or theft within the household), but generally functioning pretty well,  
has some meaningful interpersonal relationships." *Diagnostic and Statistical Manual of  
Mental Disorders, Fourth Edition (DSM-IV)*, at 32 (1995).

1 PRTF on December 2, 2000. (Tr. 251-267). He determined Plaintiff had a generalized  
2 anxiety impairment by history and borderline intelligence characterized by mild  
3 limitations in activities of daily living, maintaining social functioning and maintaining  
4 concentration, persistence or pace. He found no episodes of decompensation. (Tr. 251,  
5 261). Dr. Brown determined a mental RFC was necessary, the results of which revealed  
6 no significant limitations in 14 out of 20 categories. He found Plaintiff was moderately  
7 limited in his ability to: understand, remember and carry out detailed instructions;  
8 maintain attention and concentration for extended periods; interact appropriately with  
9 the general public (due to his borderline intelligence); respond to changes in the work  
10 place; and set realistic goals or make plans independently of others. (Tr. 265-67). He  
11 found no marked limitations in Plaintiff's mental functioning capacities.

12 Dr. Pollack examined Plaintiff on January 10 and 17, 2002. He administered the  
13 Minnesota Multiphasic Personality Inventory-II (MMPI-II), the Millon Clinical Multi-  
14 Axial Inventory-III (MCMI-III) and the WAIS, reviewed medical records (including  
15 reports from Dr. McKnight and Dr. Larson), and conducted a client interview. (Tr. 289-  
16 92). He diagnosed an Axis I reading disorder and disorder of written expression and an  
17 Axis II personality disorder, nos. (Tr. 294).

18 Based on the objective testing, Dr. Pollack opined Plaintiff had a full scale IQ of  
19 87, a verbal IQ of 86 and a performance IQ of 93. (Tr. 292). In his medical source  
20 statement (Ability To Do Work-Related Mental Activities) Dr. Pollack concluded  
21 Plaintiff had a "fair" ability (satisfactory some of the time) to maintain attention and  
22 concentration for extended periods; perform activities within a schedule, maintain  
23 regular attendance, and be punctual; complete a normal workday/week; interact with the  
24 public; and get along with co-workers and peers. (Tr. 295-96). He opined Plaintiff had  
25 "no useful ability" to accept instructions and criticism from supervisors. (Tr. 296).  
26 Plaintiff's other work related abilities were rated "good" or "excellent." (Tr. 295-96).

27 Dr. Pollack completed a second assessment form (Work Related Temperaments)  
28 which indicated moderate limits in Plaintiff's adaptability in making generalizations and

1 decisions based on sensory or judgmental criteria; dealing with people beyond giving  
2 and receiving instructions; performing under stress in jobs requiring speed and sustained  
3 attention; and multi-tasking without loss of efficiency or composure. Other adaptability  
4 limits were rated “none” to “slight.” (Tr. 297). In his narrative report, Dr. Pollack  
5 reported that Plaintiff admitted to having an explosive temper in the past. (Tr. 290). Dr.  
6 Pollack observed that test results indicated significant depression, but Plaintiff’s  
7 presentation did not reflect this. (Tr. 294).

8 At the first hearing, the ALJ concluded that the disparity in the psychological  
9 reports required the assistance of a medical advisor and/or follow up with the medical  
10 sources. (Tr. 380-82). The analysis and opinion of an expert selected by an ALJ may  
11 be helpful in adjudication, and the court should not second guess the ALJ’s resolution of  
12 conflicting medical testimony as long as the determination is based on substantial  
13 evidence. *Andrews*, 53 F.3d at 1041, (*citing Magallanes v. Bowen*, 881 F.2d 747, 753  
14 (9<sup>th</sup> Cir. 1989)). Testimony of the medical expert may serve as substantial evidence  
15 when supported by other evidence in the record. *Id.* Courts have upheld an ALJ’s  
16 decision to reject the opinion of an examining physician based in part on the testimony  
17 of a non-examining medical advisor. *Lester*, 81 F.3d at 831. If supported by substantial  
18 evidence, the ALJ’s decision must be upheld, even where the evidence is susceptible to  
19 more than one rational interpretation. *Andrews*, 53 F.3d at 1039-40.

20 Medical expert Ronald Klein, Ph.D. testified at the second hearing. (Tr. 390-94).  
21 The ALJ found his testimony and Dr. McKnight’s report to be persuasive and found no  
22 severe, medically determinable mental impairment. (Tr. 22). He gave Dr. Pollack’s  
23 report little weight because the findings were not supported by Dr. Klein’s testimony  
24 and other evidence in the record. (*Id.*) Plaintiff argues that Dr. Pollack’s evaluation  
25 should have been given controlling weight because he was the only psychologist who  
26 actually examined prior medical records, conducted a patient interview, and  
27 administered objective tests. (Ct. Rec. 12, p. 12). However, the record indicates that  
28 Dr. McKnight reviewed some prior medical records, interviewed the Plaintiff and

1 administered the WAIS intelligence test. (Tr. 246, 249).

2 In disability proceedings, the ALJ must provide ‘clear and convincing’ reasons  
3 for rejecting the uncontradicted opinion of an examining physician.” *Lester v. Chater*,  
4 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995) (*citation omitted*). If the opinion is contradicted, it can  
5 only be rejected for specific and legitimate reasons that are supported by substantial  
6 evidence in the record. *Andrews*, 53 F.3d at 1043. To meet this burden, the ALJ can  
7 set out a detailed and thorough summary of the facts and conflicting clinical evidence,  
8 state his interpretation of the evidence, and make findings. *Thomas v. Barnhart*, 278  
9 F.3d 947, 957(9<sup>th</sup> Cir. 2002) (*citing Magallanes*, 881 F.2d at 751). Historically, the  
10 courts have recognized conflicting medical evidence, the absence of regular medical  
11 treatment during the alleged period of disability, and the lack of medical support for  
12 doctors’ reports based substantially on a claimant’s unreliable, subjective complaints of  
13 pain as specific, legitimate reasons for disregarding the treating or examining  
14 physician’s opinion. *Flaten v. Sec. of Health and Human Services*, 44 F.3d 1453, 1463-  
15 64 (9<sup>th</sup> Cir. 1995); *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989).

16 The regulations provide that the ALJ must carefully consider all medical source  
17 opinions and consider the opinions therein and its consistency with the record as a  
18 whole. SSR 96-5p. While it is true that Dr. Pollack is the only psychologist who  
19 administered personality testing, no one examining medical source is entitled to  
20 controlling weight on the existence of an impairment or the ultimate issue of disability.  
21 *Batson v. Commissioner of Social Security Admin.*, 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004).  
22 Where medical reports are conflicting or inconclusive, “questions of credibility and  
23 resolution of conflicts in the testimony are functions solely of the Secretary.” *Morgan*,  
24 169 F.3d at 600 (*citing Sample v. Schweiker*, 694 F.2d 639, 642 (1982)). Further, the  
25 ALJ may draw inferences logically flowing from the evidence. *Sample*, 694 F.2d at  
26 642. The ALJ is responsible for resolving conflicts and ambiguities in the medical  
27 evidence, and the court will uphold his determinations, even if there is more than one  
28 rational interpretation. *Id.*

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As discussed above, to satisfy his step two burden, the Plaintiff must present medical evidence establishing the mental impairment. 20 C.F.R. § 416.908. Dr. Klein testified that, based on the entire record, it was his opinion that Plaintiff had no *DSM-IV* diagnoses. (Tr. 390). He supported this opinion by reference to evidence in the entire record, not just one evaluation. He stated that “borderline level of intellectual function starts at an IQ of 79 working down to an IQ of 70.”<sup>4</sup> (Tr. 391). Dr. Klein opined that Plaintiff’s scores placed him in the “low normal range” of intelligence. (*Id.*) Dr. Pollack, whose full scale IQ score (87) was notably higher than Dr. McKnight’s, also assessed Plaintiff within the low range of average intelligence, as did Dr. Larson. (Tr. 189, 292). Thus, the weight of the evidence supports the ALJ’s finding of no severe mental impairment of borderline intellectual functioning.<sup>5</sup>

Regarding the personality testing, Dr. Klein acknowledged that Plaintiff’s results revealed abnormal thinking patterns, but he did not believe a diagnosis could be based on MMPI scores alone. (Tr. 393). He opined the results indicated an individual with certain personality traits, such as preoccupation with thought process and physical function, an individual who is “rather depressed and withdrawn,” but noted that the record did not include any treatment with psychiatric medication. (Tr. 393-94). Dr. Klein concluded that objective findings in neuropsychological testing indicated “very

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<sup>4</sup> “Borderline intellectual functioning” is defined by the *DSM-IV* as a full scale IQ of 70-84. *DSM-IV*, at 684. Plaintiff’s full scale IQ was tested as 88, 81, 87 by Drs. Larson, McKnight and Pollack, respectively. The unexplained discrepancy in Dr. Klein’s definition of borderline intellectual functioning range (70-79) is noted by the court, but since Drs. Larson and Pollack tested Plaintiff at an IQ well above either definition, the discrepancy does not affect the ALJ’s analysis.

<sup>5</sup> Although the evidence does not support a finding of severe mental impairment, the ALJ properly included Plaintiff’s non-exertional limitations of no “complex reading or writing task” and no “detailed or complex instructions” in his hypothetical to the vocational expert and in his final RFC finding. (Tr. 26, 398). These limitations are supported by substantial evidence. *See Magallanes*, 881 F.2d at 756.

1 normal, very quick, sharp scanning and sequencing visual capabilities.” (Tr. 394). He  
2 testified that, based on all the medical records before the court, there were no mental  
3 health impairments. (*Id.*)

4 The ALJ carefully and thoroughly discussed the medical evidence in his decision  
5 and found that Dr. Pollack’s findings were not supported by the medical evidence as a  
6 whole. (Tr. 22). The ALJ specified that Dr. Pollack’s conclusion that Plaintiff had a  
7 “poor ability to respond to criticism” from psychopathology was not shown elsewhere  
8 in the evidence.” (Tr. 23). The record supports the ALJ’s conclusions. For example,  
9 Plaintiff testified that he had not been referred to mental health treatment or counseling.  
10 (Tr. 375). The ALJ noted that Dr. Pollack observed Plaintiff’s presentation did not  
11 indicate depression, even though the test results indicated “significant depression.” (Tr.  
12 22). Although Dr. Pollack identified a personality disorder, NOS (not otherwise  
13 specified), and opined that Plaintiff had an explosive personality that could be  
14 dangerous and would have a “poor” adaptability at receiving instruction and criticism  
15 from a supervisor (Tr. 294, 296), Plaintiff testified that controlling his temper in public  
16 was not a major issue for him. (Tr. 374). The court also notes there are no references  
17 to an explosive or dangerous personality elsewhere in the record. As the ALJ indicated,  
18 Plaintiff’s only lay off from work was due to lack of seasonal work. (Tr. 22).

19 Contrary to the “poor” adaptability rating he gave, Dr. Pollack found Plaintiff  
20 only “moderately” limited in his ability to deal with people and was “excellent” at  
21 remembering work-like procedures and understanding and carrying out short, simple  
22 instructions. (Tr. 295, 297). He also opined Plaintiff was “excellent” at responding  
23 appropriately to changes in a work setting, and found no limits in his ability to adapt to  
24 situations requiring the precise attainment of set limits, tolerances or standards. (Tr.  
25 296, 297). Because of the internal inconsistencies in Dr. Pollack’s report and lack of  
26 other evidence in the record that Plaintiff had a dangerous personality, the ALJ  
27 legitimately discounted Dr. Pollack’s interpretation of the personality test. *See*  
28 *Magallanes*, 881 F.2d at 751; *Sample*, 694 at 642; *see also* 96-5p (in deciding issues

1 reserved to the Commissioner, the ALJ is required to evaluate all the evidence and  
2 determine to what extent medical opinions are supported by the record). Plaintiff's  
3 claims that the ALJ improperly rejected Dr. Pollack's opinions and erroneously found  
4 no severe mental impairment are without merit.

### 5 **B. Credibility**

6 Plaintiff contends the ALJ failed to give appropriate reasons for rejecting his pain  
7 and symptom testimony, which, if credited, would establish his disability. (Ct. Rec. 12,  
8 p. 15). The Regulations provide detailed guidance to adjudicators evaluating a  
9 claimant's pain and other symptom allegations. 20 C.F.R. §§ 404.1529, 416.929. Once  
10 an underlying medically determinable impairment is established, and found likely to  
11 produce pain or other symptoms, "the adjudicator must carefully consider the  
12 individual's statements about symptoms with the rest of the relevant evidence in the  
13 case record" in determining if the alleged symptoms render the claimant unable to work.  
14 20 C.F.R. §§ 404.1529(a), 416.929(a); SSR 96-7p.

15 In *Cotton v. Bowen*, 799 F.2d 1403 (9<sup>th</sup> Cir. 1986), the court established the  
16 *Cotton* test for the analysis of subjective symptom testimony. The *Cotton* test requires  
17 the Plaintiff to (1) produce objective medical evidence of an impairment, and (2) show  
18 that the impairment "could reasonably be expected (not that it did in fact) produce some  
19 degree of symptom." *Cotton*, 799 F.2d at 1407-08. Once the *Cotton* test is met, the  
20 ALJ must evaluate the credibility of the claimant and can reject the claimant's testimony  
21 only with specific, "clear and convincing" reasons. *Smolen v. Chater*, 80 F. 3d 1273,  
22 1281 (9<sup>th</sup> Cir. 1996).

23 An adjudicator "may not discredit a claimant's testimony of pain and deny  
24 disability benefits solely because the degree of pain alleged by the claimant is not  
25 supported by objective medical evidence." *Bunnell v. Sullivan*, 947 F.2d 341, 345-46  
26 (9<sup>th</sup> Cir. 1991) (en banc); 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Although  
27 credibility determinations are the province of the ALJ, the ALJ must be sufficiently  
28 specific to permit the court to conclude that he did not arbitrarily discredit claimant's

1 testimony. *Thomas*, 278 F.3d at 958-59; *Morgan*, 169 F.3d at 600 (specific reasons for  
2 credibility findings must be articulated and “grounded in the evidence”); *see also*  
3 *Bunnell*, 947 F.2d at 345-46. “In addition, the ALJ must specifically identify the  
4 testimony she or he finds not to be credible and must explain what evidence undermines  
5 the testimony.” *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9<sup>th</sup> Cir. 2001).

6 The ALJ may consider the following factors when weighing the claimant's  
7 credibility: reputation for truthfulness, inconsistencies either in claimant's testimony or  
8 between his testimony and conduct, reported daily activities, work record, and testimony  
9 from physicians and third parties concerning the nature, severity, and effect of the  
10 symptoms of which claimant complains. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792  
11 (9<sup>th</sup> Cir. 1997). If there is no affirmative evidence that the claimant is malingering, the  
12 ALJ must provide clear and convincing reasons for rejecting the claimant's testimony  
13 regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
14 1998). If the ALJ's credibility finding is supported by substantial evidence in the  
15 record, the court may not engage in second-guessing. *See Morgan*, 169 F.3d at 600.

16 The ALJ found Plaintiff suffered the severe impairments of tophaceous gout with  
17 intermittent flare-ups and morbid obesity, impairments which clearly satisfy the *Cotten*  
18 test. (Tr. 23). In finding Plaintiff's subjective allegations “not entirely credible,” the  
19 ALJ specifically identified the testimony he found unreliable. (Tr. 23-24). He then  
20 gave specific reasons for rejecting the testimony, based on the medical evidence,  
21 Plaintiff's statements, and statements from others in the record. (Tr. 22-24). For  
22 example, he found that Plaintiff's treating medical sources opined he was capable of  
23 sedentary work. (Tr. 24). This finding is supported by reports from rheumatology  
24 specialist Dr. Butler that Plaintiff was doing “extremely well” on his allopurinol and  
25 Darvocet therapy, and Republic Medical Clinic reports that Plaintiff was capable of  
26 sedentary work, his gout was under control and he was walking “quite a bit and  
27 tolerating it well.” (Tr. 214, 285, 336).

28 The ALJ also found that there were reports that Plaintiff participated in numerous

1 daily activities, including visiting friends, playing catch with his nephews, carrying  
2 groceries, doing yard work, doing art and building models. (Tr. 23). These findings are  
3 supported by the record, which includes statements by Plaintiff's mother and sister that  
4 Plaintiff was sociable, visited friends every day, had no trouble participating in  
5 conversations or activities, and was very neat with good hygiene. (Tr. 139-40, 144). In  
6 November 2001, his sister (with whom he lived) reported that he participated in family  
7 activities, camped one or two times a year, drove two times per month, and his  
8 "disability is not mental." (Tr. 142). Plaintiff reported to Dr. McKnight that he  
9 engaged in numerous daily activities, including taking out the trash, carrying wood,  
10 cooking, doing his own laundry and keeping his own room clean. He enjoyed drawing  
11 and making models. (Tr. 248-49). He told Dr. Pollack in January 2002 that he walks to  
12 town and back twice a week, did his household chores, visited relatives twice a month,  
13 but had no hobbies or skills. (Tr. 291). These reports are not consistent with each other,  
14 or with Plaintiff's testimony that he does not leave the house or do household chores.  
15 (Tr. 367-68, 372-373). The ALJ's interpretation of the evidence as a whole is  
16 reasonable, and the court must uphold it, especially in light of other reasons given for  
17 the credibility finding. *Burch v. Barnhart*, 400 F.3d 675, 680 (9<sup>th</sup> Cir. 2005) (*citing*  
18 *Magallanes*, 881 F.2d at 750).

19 For example, the ALJ found Plaintiff's testimony was not consistent with the rest  
20 of the record regarding his exertional limitations. (Tr. 23). Whereas Plaintiff stated he  
21 could only lift up to 10 pounds and has to elevate his feet four hours a day, the ALJ  
22 cited to the evidence mentioned above and reports that, as recently as November 2002,  
23 Plaintiff was walking on a regular basis with no significant discomfort.<sup>6</sup> (Tr. 24, 340).

24 The ALJ also found Plaintiff's non-compliance in his medication regime  
25 indicated Plaintiff was not as disabled as he stated. (Tr. 24). A failure to adhere to  
26 prescribed medical treatment is an appropriate factor to consider in assessing a  
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28 <sup>6</sup> One of the reports also indicates that Plaintiff was not on pain medication  
during this time. (Tr. 340).

claimant's credibility. *See Fair*, 885 F.2d at 604; SSR 96-7p. The evidence supports the ALJ's reasoning. Specifically, clinical notes from Plaintiff's treating physicians and nurse practitioner express concern that Plaintiff did not take his medications as prescribed.<sup>7</sup> (Tr. 161, 207-09, 222, 310, 312, 338, 340.)

The ALJ's specific reasons for discounting Plaintiff's pain and symptom testimony are clear and convincing and supported by substantial evidence. Plaintiff's argument that this testimony should be credited fails.

### C. RFC

Plaintiff argues that the ALJ erred in finding Plaintiff could perform work in the national economy. He states the ALJ should have included his need to lie down and rest three times a day in the hypothetical submitted to the vocational expert. (Ct. Rec. 12, p. 16). The ALJ is not bound to accept as true those restrictions presented by Plaintiff's counsel. *Magallanes*, 881 F.2d at 756. The ALJ is free accept or reject propounded restrictions, as long as they are supported by the record. *Id.* at 757. "This is true, even where there is conflicting medical evidence." *Id.* at 756 (*citing Martinez v. Heckler*, 807 F.2d 771, 774 (9<sup>th</sup> Cir. 1986)). As discussed above, the ALJ's assessment and findings regarding Plaintiff's testimony and the medical opinions are supported by ample evidence. The limitations presented to the vocational expert in hypothetical "C" at the hearing reflect those findings. (Tr. 397-98, 400). These limitations, as well as the final

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<sup>7</sup> The regulations warn that the ALJ must be careful to consider reasons for a claimant's failure to take medications. SSR 96-7p. Here, the record indicates that in August 1999, Plaintiff reported not having insurance to pay for his thyroid medicine and consequently failed to take it for seven months. (Tr. 206). This alone would not be sufficient to discredit claimant's credibility. *Fair*, 885 F.2d at 603. However, the record indicates that after he began treatment with Republic Medical Clinic, Plaintiff was counseled by his treating nurse practitioner on the importance of taking his medicine regularly. She instructed him several times over the course of his treatment to call the clinic if he had problems getting his medicine. (Tr. 207, 212, 220, 312). Later medical reports indicate Plaintiff was not consistent in taking his medicine, even though when properly taken, the medications relieved his symptoms notably. (Tr. 285, 312).

1 RFC finding in the decision, are supported by the record. Therefore, the vocational  
2 expert's opinion that Plaintiff could perform sedentary work as a "cashier II" and  
3 "document preparer" is supported by substantial evidence. Plaintiff's argument that the  
4 ALJ improperly considered the vocational expert testimony fails.

### 5 **VIII. CONCLUSION**

6 The ALJ properly evaluated the medical evidence at step two in determining  
7 Plaintiff had no severe mental impairments. He gave clear and convincing reasons for  
8 rejecting Plaintiff's pain and symptom testimony. The ALJ's finding that Plaintiff was  
9 capable of sedentary work that exists in significant numbers in the national economy is  
10 supported by substantial evidence. Accordingly,

#### 11 **IT IS ORDERED:**

- 12 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 11) is **DENIED**.
- 13 2. Defendant's Motion for Summary Judgment (Ct. Rec. 15) is **GRANTED**.
- 14 3. Judgment shall be entered for the **DEFENDANT**.
- 15 4. The District Court Executive is directed to enter this Order, forward copies to  
16 counsel, and thereafter shall close this file.

17 DATED this 29<sup>th</sup> of July 2005.

18  
19 s/ Alan A. McDonald

20 ALAN A. McDONALD  
21 SENIOR UNITED STATES DISTRICT JUDGE  
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**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT, *INTER ALIA***